In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FRANK R. MOORE, AS UNITED STATES collector of internal revenue, first district, State of New York, plaintiff in error, v. MAX RUCKGABER, SR., AS SOLE EXECUTOR of the last will and testament of Louisa Augusta Ripley-Pinede, deceased.	No. 295.
FERDINAND EIDMAN, UNITED STATES collector of internal revenue for the third district of New York, plaintiff in error, v. MIGUEL R. MARTINEZ, AS ANCILLARY administrator with the will annexed of Salvador Elizalde, deceased.	No. 287.

BRIEF FOR THE UNITED STATES.

STATEMENT.

CASE NO. 295.

The original action was brought by the defendant in error, as sole executor of the last will and testament of Louisa Augusta Ripley-Pinede, against the collector of internal revenue of the first district of New York, to recover back the Federal legacy tax collected under

the war-revenue act of June 13, 1898 (30 Stat., 464). A demurrer to the complaint was overruled, judgment taken, and the case carried on error to the circuit court of appeals, which certified to this court two questions of law arising out of the facts stated in the record.

It appears that on September 25, 1898, Louisa Augusta Ripley-Pinede died at Zurich, Switzerland, leaving a considerable personal estate located in New York and a will executed in New York. At the time of her death the testatrix was a nonresident of the United States, "being then, and having been for at least eight years immediately preceding that time, domiciled in and a permanent resident of the Republic of France."

The will of the testatrix was dated November 6, 1890, and was executed in the city of New York, where the testatrix was at that time sojourning. By this will she bequeathed "all the personal property of every kind *in the United States of America* which may belong to me at the time of my death" to her daughter, Carmela von Groll, wife of Lieut. Max von Groll, then residing at Ulm, in Wurtemberg, Germany, and she appointed as executors her daughter, Carmela von Groll, Whitelaw Reid, of New York, Charles Allen, of Boston, and Max Ruckgaber, sr., of Brooklyn.

On February 17, 1899, this will was duly admitted to probate by the surrogate's court of Kings County, N. Y., and on this day the daughter, Whitelaw Reid, and Charles Allen having renounced their appointments as executors, and Max Ruckgaber, sr., having

duly qualified, letters testamentary were issued to him *as sole executor.*

The personal property of the testatrix, located in the United States at the time of her death, as valued by the appraisers appointed by the court, was as follows:

Bonds and coupons of divers American corporations	$90,134.27
One share of stock of the Tribune Association, a New York corporation	7,500.00
An indebtedness from the firm of Schulz & Ruckgaber, of New York City	8,036.43
Total	105,670.70

The amount of the debts of the testatrix, the executor's commissions, and general expenses of administration, amounted to $2,246.70, leaving a balance passing to the sole legatee under the will of $103,424.

Upon this the Federal legacy tax assessed and charged amounted to $1,551.36, to recover back which the original suit was brought.

The questions of law certified to this court are as follows:

> (1) Can the said personal property of the nonresident testatrix, Louisa Augusta Ripley-Pinedo, actually located within the United States at the time of her death, September 25, 1898, be deemed to have a situs in the United States for the purpose of levying a tax or duty upon the transmission or receipt thereof under sections 29, 30, and 31 of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898?
>
> (2) Was the transmission or receipt of the

said personal property of the nonresident testatrix, Louisa Augusta Ripley-Pinede, which was actually located in the United States at the time of her death, September 25, 1898, subject to taxation under sections 29, 30, and 31 of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898?

CASE NO. 287.

The original action was brought by the defendant in error, as ancillary administrator with the will annexed of Salvador Elizalde, deceased, against the collector of internal revenue for the third district of New York, to recover back the Federal legacy tax collected under the war-revenue act of June 13, 1898 (30 Stat., 464). A demurrer by the Government to the complaint was overruled, judgment taken, and the case carried on error to the circuit court of appeals, which certified to this court two questions of law arising out of the facts stated in the record.

It appears that on April 27, 1899, Salvador Elizalde, a nonresident alien, a subject (Cuban) of the King of Spain, who had never resided within the United States, died in Paris, France, leaving a large personal estate in the hands of his agents in New York and a will in the Spanish language, executed in Paris in 1891, pursuant to the laws of Spain. The personal estate left by the decedent was in charge of P. Harmony's Nephews & Co., 35 South William street, New York City, and consisted of the following Federal, municipal, and corporate securities, as inventoried under the administration hereinafter referred to:

Par value.	Description of securities.	Form.	Redeemable.	Rate of interest.	April 27, 1899, price.	Amount.
				Per cent.		
$854,400	United States 4 per cent bonds of 1907	Registered...	After July, 1907	4	112½	$961,200
2,000	New York City "Croton Water Main Stock"	...do	Nov. 1, 1900	7	105½	2,105
5,000	New York City "Additional New Croton Aqueduct."	...do	Aug. 1, 1900	6	102½	5,125
22,000	Brooklyn "Permanent Water Loan"	...do	July 1, 1899	6	100	22,000
1,000	...do	...do	Jan. 1, 1902	6	107½	1,075
2,000	Brooklyn "Public Parks"	...do	July 1, 1924	6	147½	2,950
17,000	Illinois Central (Mid. Div.) 5 per cent bonds	...do	Aug. 1, 1921	5	117	19,890
30,000	New York, Lackawanna and Western, first mortgage 6 per cent bonds of 1921.	...do	Jan. 1, 1921	6	134	40,200
10,000	Harlem River and Port Chester first mortgage 6 per cent bonds.	...do	Oct. 1, 1903	6	111	11,100
25,000	New York Central and Hudson River Railroad first mortgage bonds.	...do	Jan. 1, 1903	7	114½	28,625
11,000	New York and Harlem Railroad Company first mortgage 7 per cent bonds.	...do	May 1, 1900	7	107	11,770
26,000	Morris and Essex Railroad Construction mortgage 7 per cent bonds.	...do	Oct. 1, 1901	7	108½	28,210
25,000	Albany and Susquehanna Railroad first consolidated mortgage bonds.	...do	Apr. 1, 1906	6	115	28,750
25,000	Utica, Clinton and Binghamton Railroad first mortgage 5 per cent bonds.	Bearer	July 1, 1939	5	121	30,250
255,400						293,250

Salvador Elizalde left an only son, Arturo Elizalde, born in Cuba, who is a nonresident alien and a Spanish subject.

The will was filed and protocolized in the office of the Spanish consul in Paris, and thereby under the laws of Spain and the consular convention or treaty between Spain and France, Arturo Elizalde, the sole legatee under the will, became entitled to the possession and administration of all the personal property of the decedent. The will proposed to give all the personal property of the decedent to said Arturo, but, by the laws of Spain, only one-third of the property passed by the will and the remaining two-thirds passed to the son by and under the Spanish intestate law.

After the filing of the will in Paris, Arturo Elizalde, the sole heir and legatee, entered upon the administration of the decedent's personal estate, and appointed the defendant in error, Miguel R. Martinez, his attorney, for the purpose of receiving ancillary letters of administration, with the will annexed, in the State of New York, and such letters were issued to him by the surrogate of New York County. After receiving such letters, Martinez took possession of the securities. Upon the transmission of the legacy and distributive share to Arturo Elizalde, a Federal legacy tax, amounting to $4,293.76, was assessed and paid under protest. To recover this back the original suit was brought.

The questions of law certified are as follows:

> 1. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act

of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon the passing of any legacy arising out of the personal property of a nonresident alien who has never resided or had a domicile within the United States, and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicile, pursuant to the laws thereof, by which he gives all his property to a nonresident alien legatee, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

2. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon the passing of any distributive share arising out of the personal property of a nonresident alien who has never resided or had a domicile within the United States, and who dies without the United States, in the year 1899, intestate, and by the law of his foreign domicile all of his personal property passes to his son, also a nonresident alien, and who leaves certain personal property within the State of New York exceeding $10,000 in value.

ARGUMENT.

I.

In case No. 295, the court will observe:

First. That the will was made in New York, according to the laws of that State;

Second. That it bequeathed only personal property within the United States;

Third. That the will was probated in New York, letters testamentary issued there, and the administration of the estate conducted entirely under the laws of New York and by a sole executor residing there; and,

Fourth. That the only property which passed under the will was property located in New York.

Such being the circumstances, will, property, and executor all subject to and regulated by the laws of New York, the sole circumstance relied on to exempt this legacy from Federal taxation is that the testatrix at the time of her death was a nonresident of the United States, being at that time and for eight years preceding "domiciled in and a permanent resident of the Republic of France." At the same time it is to be noted that she did not die in France, but at Zurich, in Switzerland. Her residence in France at the time of her death was an alleged legal status. The situation would have been the same if she had died in New York, where her will had been made and her property was located, provided she still claimed to be a nonresident of the United States and *domiciled* in France.

II.

The exemption from the Federal legacy tax claimed for the transmission or receipt of the personal estate located in the United States of a non-resident decedent, is largely based upon the application, in the construction of sections 29 and 30 of the war-revenue act of

June 13, 1898, of the ancient maxim *mobilia sequuntur personam*. It is evidently to this that the circuit court of appeals refers in propounding the primary question submitted in No. 295, namely:

> Can the said personal property of the non-resident testatrix, Louisa Augusta Ripley-Pinede, actually located within the United States at the time of her death, September 25, 1898, *be deemed to have a situs in the United States* for the purpose of levying a tax or duty upon the transmission or receipt thereof under sections 29, 30, and 31 of the act, etc., approved June 13, 1898?

With respect to the limited operation of this maxim at present, under modern conditions, I can not do better than to quote the language of this court, speaking by Mr. Justice Gray, in the case of *Pullman Palace Car Company* v. *Penna.* (141 U. S., 18, 22):

> No general principles of law are better settled or more fundamental than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since

the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*—the law of the place where the property is kept and used. (*Green* v. *Van Buskirk*, 5 Wall., 307, and 7 Wall., 139; *Harvey* v. *Rhode Island Locomotive Works*, 93 U. S., 664; *Harkness* v. *Russell*, 118 U. S., 663, 679; *Walworth* v. *Harris*, 129 U. S., 355; Story on Conflict of Laws, sec. 550; Wharton on Conflict of Laws, secs. 297–311.) As observed by Mr. Justice Story in his commentaries just cited, "although movables are for many purposes to be deemed to have no *situs* except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner, and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax. (*Lane County* v. *Oregon*, 7 Wall., 71, 77; *Railroad Co.* v. *Pennsylvania*, 15 Wall., 300, 323, 324, 328; *Railroad Co.* v. *Peniston*, 18 Wall., 5, 29; *Tappan* v. *Merchants' Bank*, 19 Wall., 490, 499;

State Railroad Tax Cases, 92 U. S., 575, 607, 608; *Brown* v. *Houston*, 114 U. S., 622; *Coe* v. *Errol*, 116 U. S., 517, 524; *Marye* v. *Baltimore and Ohio Railroad*, 127, U. S., 117, 123.)

In the case of *Adams Express Co.* v. *Ohio* (166 U. S., 185), in which was involved the situs for taxation of the intangible property of an express company, Mr Justice Brewer, speaking for the court, in denying the petition for a rehearing, said (p. 224):

> It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was "*mobilia personam sequantur*," but that maxim was never of universal application, and seldom interfered with the right of taxation. (*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S., 18, 22.) It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 of intangible property for purposes of taxation was changed from the State of New York to that of New Jersey.

Again, page 225:

> In conclusion, let us say that this is eminently a practical age: that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such

burden of taxation as a fair distribution of the actual value of their property among those States requires.

In the recent case of *Bristol* v. *Washington County* (177 U. S., 133), in which the court held that the personal property of a citizen of and resident in one State, invested in bonds and mortgages in another State, is subject to taxation in the latter State, the court, speaking by Mr. Chief Justice Fuller, quotes the following language from the opinion below (pp. 141, 142):

> "For many purposes the domicil of the owner is deemed the *situs* of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual *situs* of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which can not be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its *situs* where it is owned—at the domicil of the creditor. The creditor, however, may give it a business *situs* elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business." After citing *Catlin* v. *Hall*, 21 Vermont, 152; *People* v. *Smith*, 88 N. Y., 576; *Wilcox* v. *Ellis*, 14 Kansas, 588; *Board of Supervisors* v. *Davenport*, 40 Illinois, 197, and many other cases, the

opinion continued thus: "The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government. Now, here was property within this State, not for a mere temporary purpose, but as permanently as though the owner resided there. It was employed here as a business by one who exercised over it the same control and management as over his own property, except that he did it in the name of an absent principal. It was exclusively under the protection of the laws of this State. It had to rely on those laws for the force and validity of the contracts on the loans, and the preservation and enforcement of the securities. The laws of New York never operated on it. If credits can ever have an actual *situs* other than the domicil of the owner, can ever be regarded as property within any other State, and as under obligation to contribute to its support in consideration of being under its protection, it must be so in this case."

III.

The cases to which I have referred involved the direct taxation of personal property where located, although the owner was domiciled in another State, but the same disregard of the old maxim referred to obtains in the levying of inheritance taxes by the various States of the Union. It is unnecessary for me to refer to the provisions of the inheritance tax laws of the several States. They will be found in the appendix to Dos Passos on Inheritance Tax Law, second edition. I

know of no State levying a legacy tax which does not impose the tax upon the personal property of a nonresident decedent which is located in the State. Respecting the liability of such property or its transmission to taxation, Dos Passos says (p. 167, sec. 47):

> In some States this result has been reached either by a construction placed upon the statutes on ground of public policy, favoring equality, and to prevent unjust discrimination between estates of resident and nonresident decedents, and in others by express legislation, and the tax has been imposed upon both the real and personal property, tangible and intangible, of nonresident or alien decedents actually within the taxing State at the time of death, whether or not there be legatees or heirs within the State. In such cases the theory seems to be that for the purposes of this tax the succession is deemed to take place under the law of the taxing State, in reaching which result the courts have leaned toward the actual or real *situs* of property, having a visible and tangible existence, rather than to the mere domicile of the owner (referring to cases).

In the State of New York it was held that the collateral inheritance-tax act of 1885 did not apply to the property of a nonresident decedent located within the State, but this was because of the peculiar language of the act, the phraseology of which, as the court said, was "singularly involved and obscure." (See *Matter of Enston*, 118 N. Y., 174, 177.) The act as originally passed provided that "all property which shall pass by

will or by the intestate laws of the State, from any person who may die seized or possessed of the same *while being a resident of the State*, etc.," and a divided court held, in the case which I have just cited, that this language restricted the tax to property passing from a decedent who was a resident of the State.

In 1887 the act was amended so as to provide that all property "which shall pass by will or the intestate laws of this State, from any person who may die seized or possessed of the same while a resident of this State, *or if such decedent was not a resident of this State at the time of death, which property, or any part thereof, shall be within this State*," *and* the court of appeals of New York held, in the *Matter of the Estate of Romaine* (127 N. Y., 80), that the personal property of a nonresident intestate, which was located in New York, was liable to taxation under the act. I quote from the opinion of the court, bottom page 86:

> That the legislature had the power to do this can hardly be questioned. (*Matter of McPherson*, 104 N. Y., 306.) As was said by Judge Story, when writing upon this subject: "A nation within whose territory any personal property is actually situated has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there." (Conflict of Laws, sec. 550.) In *People ex rel. Hoyt* v. *Commissioners of Taxes* (23 N. Y., 224, 228), Judge Comstock quotes with approval the foregoing extract, and adds: "I can think of no more just and appropriate exercise of the sovereignty of a

> State or nation over property situated within it and protected by its laws than to compel it to contribute toward the maintenance of government and law. Accordingly there seems to be no place for the fiction of which we are speaking (*mobilia personam sequuntur*) in a well-adjusted system of taxation." (See, also, *Guillander* v. *Howell*, 35 N. Y., 657; *Graham* v. *First National Bank of Norfolk*, 84 id., 393, 401; *Catlin* v. *Hull*, 21 Vt., 152; Dos Passos on Collateral Inheritance, 37, 92.)

The court in its opinion also cites *State* v. *Dalrymple*, 70 Md., 294; *Alvany* v. *Powell* 2 Jones Eq. (N. C.), 51.

IV.

I concede that in the case of *Thompson* v. *Advocate-General* (12 Clark & F., 1—decided in 1845) it was held that the English legacy act did not apply to property within Great Britain of a nonresident decedent; but I am safe in saying that the States of the Union have declined to follow the English rule that personal property has no *situs* of its own and therefore follows the domicil of its owner, but on the contrary have taken the sensible view that personal property within a State of a person living abroad, which receives the benefit not only of the protection of its laws, but of the prosperity of its people, ought, on its transmission after death, to bear the same burden and pay the same tax that would be imposed if it belonged to a resident.

It is contended on the other side that, since we got the idea of our legacy tax law from England, we must

in its construction and application follow the English authority to which I have alluded; but I submit that the war-revenue act of 1898 was passed after the enactment by many of the States of the Union of inheritance tax laws, all of which were made applicable to the personal property within the State of nonresident as well as resident decedents. These laws are referred to in the opinion of this court in *Magoon* v. *Illinois* (170 U. S., 283), decided before the war-revenue act of 1898 was passed. The principles upon which these laws were based are stated by this court, speaking by Mr. Justice McKenna, as follows (p. 288):

> (1) An inheritance tax is not one on property, but one on the succession.
>
> (2) The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege—and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation.

If in taking the personal property within a State of a nonresident decedent a right or privilege is enjoyed which the State may tax by annexing a condition, why is there not such a transmission or passage of that property as to bring it within the operation of the Federal legacy tax?

In the case of *United States* v. *Perkins* (163 U. S., 625), it was held that property bequeathed to the

United States could be lawfully included in the New York inheritance tax. In the opinion, delivered by Mr. Justice Brown, it was said (p. 628):

> That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other States.

Yet, again (p. 630):

> We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it.

In the case of *Knowlton* v. *Moore* (178 U. S., 41), Mr. Justice White, speaking for the court, said:

> The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate.

In the case of *Plummer* v. *Coler* (178 U. S., 115), all the authorities, State and Federal, bearing upon the nature of inheritance-tax laws are reviewed for the purpose of determining whether the portion of an estate in New York invested in United States bonds was taxable under the inheritance-tax law of that State, and this court, speaking by Mr. Justice Shiras, reached the following conclusion (p. 134):

> We think the conclusion fairly to be drawn from the State and Federal cases is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing the tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing, and that the incidental fact that such property is composed, in whole or in part, of Federal securities does not invalidate the tax or the law under which it is imposed.

V.

Such being the law of the States, personal property being taxed where located, irrespective of the domicile of its owner, and the inheritance-tax laws of the States being applied to the property within the States of non-resident as well as resident decedents, upon the theory that in the transmission or receipt of such property a privilege is enjoyed under the law of the State, I submit that it was the intention of Congress, in enacting the Federal legacy tax law of 1898, to reach and tax the passage of personal property occasioned by death in every case where such transmission is made taxable by a State law, save where the Federal law itself makes specific exemptions. If there was a transmission or receipt of property within a State as the result of death, so that the State could tax the privilege enjoyed in such transmission or receipt, then there was a passage of the property within the United States ample to warrant the Federal exaction. I think it clear that Congress acted upon this conviction and with the intention of reaching every transmission or

passage of personal property within the United States, whether by will or in case of intestacy, or as a gift *inter vivos* to take effect upon death. An examination of the language of the act, with the amendments which have been made since its passage, will confirm this conclusion.

Section 29 provides:

> That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property * * * passing, after the passage of this act, from any person possessed of such property, either by will or the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, etc., shall be, and hereby are, made subject to a duty or tax to be paid to the United States, as follows, etc.

It is to be observed that it is not the personal property referred to which is made subject to the tax, but the administrator, executor, or trustee who has the property in charge or trust.

Every person is made subject to the tax who has in charge or trust, whether as administrator, executor, or trustee—

Any legacy or distributive share arising from personal property passing—

(*a*) Either by will, or

(*b*) By the intestate laws of any State or Territory; or,

Any personal property or interest therein transferred by deed, grant, bargain, sale, or gift, made or intended to take effect after the death of the grantor.

The statute does not provide that the legacy must pass from any person *residing in the United States* possessed of such property, etc. It applies to all legacies, distributive shares, or gifts to take effect after death, which are held in charge by administrators, executors, or trustees within the United States. The law is framed so as to reach every case of the passage of personal property within the United States from the dead to the living, whether by will, or as a result of intestacy, or by gift to take effect after death.

That Congress intended by the language in section 29 to reach every personal estate within the United States, whether of a resident or a nonresident decedent, is shown conclusively by the amendments made to section 30 by the act of March 2, 1901 (31 Stat., 948).

As pointed out in *Knowlton* v. *Moore* (178 U. S., 41, 69), Congress had before it in enacting the present law, not the act of 1864 as amended by the act of 1866, but the original act of 1864. The original act of 1864 contained in section 125 (now section 30) a method for the collection of the tax, and provided that every executor, administrator, or trustee, before payment and distribution, should pay to the collector or deputy collector "of the district of which the deceased person was a resident" the amount of the duty or tax assessed. In the *Hunnewell case* (13 Fed. Rep., 617) this provision was referred to in support of the conclusion that the act of 1864 was only intended to

reach the estates of resident decedents. But since that time the imposition of inheritance taxes has become general throughout the States, and all such duties have been imposed upon the personal estates of nonresident as well as resident decedents. The Commissioner of Internal Revenue, in order to carry out the obvious intention of Congress to make this tax a general and uniform one, so as to reach all personal property passing from the dead to the living within the United States, in his report for 1900 made the following recommendation (see Treasury Annual Report, 1900, p. 617):

> I recommend that the following amendments to the law relative to the tax on legacies be made:
>
> That in section 29, act of June 13, 1898, there be inserted, after the word "otherwise," the words "including persons residing abroad."
>
> That in section 30, after the words "shall pay to the collector or deputy collector of the district of which the deceased person was a resident," there be inserted the words "*or in which the property was located, in case of nonresidents.*"
>
> These amendments, if made, will provide that estates in this country of persons residing abroad at time of their death shall be taxed the same as estates of persons residing in this country. There should be no unjust discrimination in favor of persons residing abroad whose property is in this country and distributed under our laws. This office has ruled that the tax accrues on legacies in such cases (Treasury

> Decisions, 1899, No. 21052), but it would be preferable to have the law specifically so declare, as it has been contended otherwise.

In response to this recommendation, Congress did not insert in section 29 after the word "otherwise" the words "including persons residing abroad," for the very obvious reason that the language of that section was already comprehensive enough. But it did, in section 30, make the amendment suggested, in order to correct the oversight in the administrative portion of the act. So that section 30 now provides (see 31 Stat., 948) that every executor, administrator, or trustee, before payment and distribution, "shall pay to the collector or deputy collector of the district of which the deceased person was a resident, *or in which the property was located in case of nonresidence*, the amount of the duty or tax assessed, etc."

If Congress had amended section 29 as suggested, it might be urged with force that the original language imposing the tax was not broad enough to reach the personal estates of nonresident decedents. But Congress, by declining to amend this section, and by correcting the administrative machinery in the way indicated, has shown conclusively that it intended to subject to this tax the personal estate of nonresident as well as resident decedents.

VI.

But it is urged upon the authority of the case of *United States* v. *Hunnewell* (13 Fed. Rep., 617), that since the law would not reach the personal estate of the

nonresident decedent if she had died intestate, it can not be construed so as to reach the personal estate which she bequeathed by will. Before discussing the *Hunnewell case*, it may be well to call attention to the peculiar facts in No. 295. I suppose counsel would hardly contend that if Madame Ripley-Pinede had left with her agents in New York a deed of trust executed in New York and intended to take effect upon her death so as to dispose of her property in the precise manner in which she did by will, that the passage of the property in that way would not be subject to the legacy tax. And yet she did substantially the same thing. This is not a case of a foreign will, upon which ancillary administration was obtained. The testatrix chose to invest her property in New York. It was not there casually. It was kept there for investment because it was to her interest to have it held and managed in New York. Under all the decisions of our courts that property was subject to taxation in New York. She had a right to make her will abroad. It is claimed she was a resident of France, although she died in Switzerland. But for her own reasons, and probably because she trusted the laws of New York more than the laws of France, she made her will in New York, and she appointed citizens of the United States as her executors. She intended that that will should be fully administered in New York, and it has been so administered. It can not be denied that this will, made and administered in New York, obtained its validity and virtue under the laws of New York.

Evidently, then, whatever passed under this will passed clearly by virtue of the laws of New York; and how absurd it is to rely in this case upon the old maxim *mobilia personam sequuntur*, when the testatrix herself, by her entire course of conduct with reference to her property within the United States, showed clearly that she intended the property to remain here, subject to the laws of this country and not to follow her to France or Switzerland or wherever she might go.

VII.

But to return to the *Hunnewell case*. That case was decided in 1882, long after the act of 1864 had been repealed. It is fair to say it was not elaborately argued. The opinion occupies a little over a page and three cases are cited. The reason given for the decision is that, if the decedent had died intestate, her son would not have taken a distributive share "by the intestate laws by any State or Territory," but, if at all, by the law of France, the domicile of the decedent; and that if the act did not make the duty payable when the decedent died intestate it would not be payable when she died testate. This argument might have been extended further to gifts by saying that if the act did not make the duty payable when the nonresident decedent died intestate, neither would it be payable if he had made a gift by deed or grant, to take effect upon his death. And yet the English courts, while adhering to *Thompson* v. *Advocate-General* (12 Clark & Fin., 1), where the nonresident dies leaving a foreign will, have held, in a number of cases, that a succession

created by a gift of property in England intended to take effect after death is subject to the tax. With respect to this Hanson says (Hanson's Death Duties, bottom p. 531):

> With regard, however, to personal property of which the owner disposes, by deed or instrument *inter vivos*, so as to create a succession, the law of the settler's domicile can have no effect in determining the liability to duty which must, under such circumstances, depend upon the "forum of administration" of the settlement. When this forum is English, e. g., in all cases where the trustees are resident in this country and the settlement is in English form, succession duty will be payable. And this rule has not only been recognized with regard to settlements of personal property created by deed, but has also been extended to cases of succession arising under trusts created by direction of a will.

Whatever may be the law in England, in this country the matter of descent and distribution is regulated by statute, and no property within a State can pass to legatees or distributees except by virtue of and in compliance with the law of the State. This applies to all property, the property of aliens as well as the property of residents. In this connection I beg to refer to the early case of *Mager* v. *Grima* (8 How., 490), growing out of the imposition by the law of Louisiana of a tax of 10 per cent on legacies, when the legatee was neither a citizen of the United States nor domiciled in that State. The act was assailed upon the ground

that it was repugnant to the Constitution of the United States. But the judgment of the State court sustaining the law was affirmed, Mr. Chief Justice Taney, speaking for the court, saying (p. 493):

> Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament or by inheritance, and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. *The right to take is given to the alien, subject to a deduction of 10 per cent for the use of the State.*

The personal property in New York of persons residing abroad is as fully within the dominion of that State as that of persons residing there. The broad power referred to by Chief Justice Taney exists there just as it did in Louisiana. New York has by its law regulated the descent and distribution of such property.

It has given effect to the wills of persons dying abroad upon certain conditions and has directed that property of aliens shall descend in the manner provided by their own law upon certain conditions. But these provisions are the law of the State of New York and the property descends by virtue of that law. In every case the condition is annexed that the property shall contribute to the State by the payment of an inheritance tax. The very fact that such a condition is annexed, shows that there is a passage of the property from the dead to the living under the law of New York. The law of New York gives effect to foreign wills upon certain terms and conditions. When these are complied with, the force of the law of New York flows into the foreign will, giving it strength and effect upon the property located in New York. So in the case of the intestacy of an alien leaving property in New York. After a compliance with certain conditions the law of New York provides that his property shall be disposed of and distributed in a certain way. It adopts the law of his domicil as the rule, but that law has no force of its own in New York. It is the New York law which has force, and so there is a New York intestate law in the case of foreigners as well as of citizens.

Since the law of New York regulates descent in the case of the intestacy of a nonresident as well as of a resident, I submit that Congress never intended to restrict the phrase "the intestate laws of a State" to those laws alone which deal with the intestacy of

residents. It meant to include all laws regulating descent in cases of intestacy, regardless of the domicil of the decedent.

VIII.

No. 295 is not a case of ancillary administration under a foreign will, but No. 287 is, and in support of my contention that the law of New York regulates the transmission of the estates of nonresidents as well as residents, let me refer to the statutes governing foreign wills.

Section 2694 provides that the validity and effect of a testamentary disposition of real property, and the manner in which real property descends where it is not disposed of by will, are regulated by the laws of the State without regard to the residence of the decedent. It then provides:

> *Except where special provision is otherwise made by law*, the validity and effect of the testamentary disposition of any other property situated within the State, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the State or country of which the decedent was a resident at the time of his death.

The New York law gives force and effect to the intestate law of the country of domicil, "except where special provision is otherwise made by law," thus asserting the entire dominion of New York over the subject. This is the intestate law of New York with respect to nonresidents, with the special exceptions indicated.

The succeeding provisions of this chapter relate to the administration of foreign wills through ancillary

letters. In order to carry such wills into effect administration must be taken out under the New York law and all the provisions of this chapter complied with.

Section 2700 directs the person to whom ancillary letters are issued, *unless otherwise ordered by the proper authorities*, to transmit the personal property of the decedent to the country where the principal letters were granted "to be disposed of pursuant to the laws thereof."

Section 2701 authorizes the proper courts of New York to direct the person to whom ancillary letters have been issued either to apply the assets to the payment of the decedent's debts within the State "*or to distribute the same among the legatees or next of kin, or otherwise dispose of the same as justice requires*"

Section 2702 applies to the person to whom ancillary letters have been granted, the general provisions of the laws of New York relating to executors or administrators.

All these provisions show conclusively that no personal property, whether the decedent was a resident or a nonresident of New York, can be transmitted to his legatees or distributees, except after a compliance with the laws of New York relating thereto. The executor, administrator, or trustee acts under the law of New York as a medium for passing such property from the dead to the living. Such transmission, in accordance with the laws of New York, is made taxable by the law of New York, and was intended to be reached by the Federal legacy tax.

IX.

It is urged on the other side that the law must be strictly construed in favor of the exemption or noninclusion of the *personal property of nonresidents, and* many authorities are cited. In view of the facts to which I have called attention, namely, that the maxim *mobilia personam sequuntur* has not been held to apply within the States either in the taxation of personal property or in the collection of legacy duties, and in view of the general and comprehensive language of the Federal legacy act, I submit that another rule of construction applies, which is thus stated in Cooley on Taxation, second edition, page 204:

> As taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; and it can not be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain. (Citing many cases.)

The only doubtful words in this act are the words "the intestate laws of any State or Territory," and I submit that this phrase may be construed and should be construed so as to include every law of a State or Territory which deals with a case of intestacy, whether of a resident or of a nonresident. The court will not construe these words so as to limit the meaning to the laws defining descent in the case of intestacy of a resident, when there is a law of the State regulating descent where the intestate is a nonresident. Suppose the foreign rule of descent is adopted by the law of

New York, what Mr. Justice Miller said in the *Railroad Tax Cases*, (92 U. S., 612), applies: "But after all, the rule is merely the law of the State which recognizes it."

The construction contended for by the other side destroys the uniformity and equality of the law, for it exempts the transmission of certain personal property from the legacy tax. The States tax all personal property passing after death, regardless of the residence of the decedent. The United States may and ought to do the same. Here then is ground for invoking that other rule to which Mr. Justice White referred in *Knowlton* v. *Moore* (178 U. S., 41, 77):

> We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. (Citing cases.)

X.

To sum up: The right of property does not include the right to dispose of it after death. The power of transmitting property from the dead to the living is a creature of the State. Personal property, as well as real estate, is subject to the dominion of the State wherein located and can be disposed of after death only under and by virtue of its laws. The State which has control may regulate the transmission and annex such conditions as it sees fit. The conditions may affect the disposition of the property and may be made

dependent upon the status of interested parties either to the State or to one another. In other words, citizenship, domicile, relationship, may be used in determining how the property shall pass and what tax shall be imposed upon its transmission. The State may direct that the property shall pass according to relationship in in a fixed way, with no power to direct its disposition otherwise by will, or it may require a portion to pass in a fixed way and permit the decedent by will to control the disposition of the remainder, or it may permit the decedent to dispose of all by will. Again, if a will is permitted, the State may require it to be executed according to its own laws, or permit it to be executed in the manner prescribed by the laws of some other country. If the decedent left no will, the State may require the property to pass according to its own laws, or permit it to pass after the mode fixed by the laws of some other country. At the same time the State may in every case reserve to itself a portion of the personal estate, no matter what the domicil of the decedent was. Since the property in any and every event passes under the law of the State, the State may reserve to itself, in the way of an inheritance tax, a certain percentage of the estate, and only permit the remainder to pass to the legatees or distributees. I refer to all this simply for the purpose of pressing the point that in every instance there is a passage of the property by virtue of the law of the State. The fact that the New York law controls in the passage of the personal estate of nonresidents as well as residents is

conclusively shown by the fact that the New York law takes a part of the personal estate in every instance for its own use, permitting only the remainder to pass.

A reference to the laws of the different States of the Union will show a variety of provisions with respect to the descent of personal property, whether belonging to residents or nonresidents. Each State has felt free to regulate the matter for itself. I may submit to the court in a separate pamphlet a compilation of the laws of the leading States upon this subject.

What I desire especially to urge is that whatever rule may be applied to the personal estate of a nonresident, that rule obtains force and vigor alone from the law of the State which has dominion over the property. If the rule of a foreign country is adopted, it becomes to that extent the law of the State. The law of France has no force in New York unless New York adopts and makes it in a particular case the law of New York, and then it operates as the law of New York, not as the law of France. A foreign administrator has no authority to go into New York and simply by virtue of the letters issued to him abroad take possession of the personal property of a decedent and turn it over to the legatees or distributees. Before he can act as the medium of transmitting such property from the dead to the living he must seek the aid of the law of the State which has control of the property. Application must be made to the proper court for authority to take possession of the property, and a compliance had with all the conditions of the local law respecting the payment of local debts and taxes and the filing of accounts,

etc., before the property can be passed on to the legatees or distributees. When the property does finally pass on, whether by will or by the intestate laws, it passes after a full compliance with the local law and by virtue of that law.

CONCLUSION.

Considerations of public policy are urged by the other side. The taxation of the personal estate of nonresidents is denounced as unequal and unjust. It is urged in one of the briefs that this court institute reform by applying generally, in matters of taxation, the maxim so much relied on, *mobilia personam sequantur*. Just how the court can do that is not explained. It is conceded that all the State laws imposing inheritance taxes reach the personal estate of nonresident as well as resident decedents. Will this court hold that those provisions are unconstitutional? If so, upon what ground? The court will have to upset a long line of decisions, beginning with *Mager* v. *Grima*, which I have quoted, in order to do that. Or will the court, in deciding this case, apply the "higher law" of *jus gentium* which is invoked, and hold not only that Congress did not intend to tax the transmission of the personal estate of nonresidents, but lacked the power to do so? And if so, upon what ground? If a State may tax the transmission or receipt of personal property within its borders belonging to a nonresident, may not the United States do the same thing? And why ought it not to do the same thing? Is there not a special reason why the United States should collect

this tax, even if the States did not? The persons who live and die abroad leaving personal esates here belong as a rule to one of two classes, either Americans who, for some reason, have renounced their country, or foreigners who prefer, for reasons of profit, to invest their estates here. In either case the stocks and bonds and personal property found in this country after the death of the nonresident, have been kept or placed here for investment because it was advantageous to do so. There is no country which offers such a field for profitable investment as this. It is most natural, therefore, that Americans who prefer to marry or move and live abroad should leave their wealth in the hands of agents here for investment; and the same is true of foreigners who desire to increase their fortunes by profitable investment. They send their money to agents here with authority to invest and reinvest it. Such property does not answer to the "*mobilia*" of the ancient maxim. It does not follow its owner. It is not like money or jewels. It stays here, it is put to use here, and from that use it grows and increases. It receives the protection of our Government and our law and reaps the benefit of the prosperity due to the enterprise and energy of our people. If there is any property which should be required to pay a contribution to the Government, it is such property. Its owner, instead of spending his money here, spends it abroad. We can't make him pay because he stays away; but we can make his personal property pay, especially when disclosed by death, for frequently he manages to conceal it up to that time.

In the case of aliens, it is peculiarly appropriate that their personal estates should be compelled to pay a contribution to the general Government, because they have at all times free access to its courts, and all the powers of the United States are at their disposal for the protection of their rights of property and person. They receive the benefit; let their estates bear at least a slight portion of the burden.

JOHN K. RICHARDS,
Solicitor-General.

NOVEMBER 12, 1901.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FRANK R. MOORE, AS UNITED STATES COLLECTOR of internal revenue, first district, State of New York, plaintiff in error,
v.
MAX RUCKGABER, SR., AS SOLE EXECUTOR OF the last will and testament of Louisa Augusta Ripley-Pinede, deceased. } No. 295.

FERDINAND EIDMAN, UNITED STATES COLLECTOR of internal revenue for the third district of New York, plaintiff in error,
v.
MIGUEL R. MARTINEZ, AS ANCILLARY ADMINISTRATOR with the will annexed of Salvador Elizalde, deceased. } No. 287.

BRIEF FOR THE UNITED STATES IN REPLY.

I.

The question before the court is one of construction. The language of the act permits of two constructions. The one taxes all personal property (with the exceptions mentioned in the act) within the United States, passing by will or by descent or by gift to take effect after death. The other exempts such property if the decedent had a domicile abroad at the time of his death.

This exemption is claimed upon the ground that in the transmission and taxation of personal property the maxim *mobilia personam sequuntur* ought to and does apply; and in support opposing counsel rely upon the English case of *Thompson* v. *Advocate-General* (12 Clark and Fin., 1), which has been followed in the United States in *United States* v. *Hunnewell* (13 Fed. Rep., 617). The broad assertion is made that "the English courts, prior to the enactment of the act of 1864, had, without exception, construed the English legacy duty act of 1796 so as not to include legacies passing by the wills of nonresidents" (additional brief, p. 17), and that "by an unbroken line of decisions—we say unbroken, as the one or two cases to the contrary are hardly worth consideration—the doctrine of the maxim '*mobilia*,' etc., has been thoroughly established with reference to legacy tax statutes," etc. (additional brief, p. 42).

It is the purpose of this reply brief to lay before the court the authorities which, I submit, show conclusively:

(1) That for nearly fifty years after the passage of the English legacy act of 1796, the English courts never adopted or applied the maxim "*mobilia*," etc., in its construction. When they did finally adopt it, they did so out of considerations of public policy.

(2) That in place of having been thoroughly established with reference to legacy tax statutes in the United States, this maxim of "*mobilia*," etc., has been repudiated and disregarded, and both the legislation

and the decisions of the States have proceeded upon the theory that the situs of the estate and not the domicile of the decedent ought to control in the levying of inheritance taxes.

II.

THE ENGLISH CASE. (**Thompson v. Advocate Gen., 12 Cl. and Fin., 1.**)

So far from it being true that the English courts did without exception construe the English legacy duty act of 1796 so as not to include legacies passing by the wills of nonresidents, the fact is that in *Attorney-General* v. *Cockerell*, 1 Price, 165 (1814), and *Attorney-General* v. *Beatson*, 7 Price, 560 (1815), the English courts held that the doctrine of the domicile of the decedent did not apply and that the situs of the personal property bequeathed was the determining fact. It was not until thirty years after this that the rule of "*mobilia*," etc., was adopted in the case of *Thompson* v. *Advocate-General*.

Lord Campbell, in his opinion in *Thompson* v. *Advocate-General* (12 Clark and Fin., 1), says, page 28:

> The truth is, my lords, that *the doctrine of domicile has sprung up in this country very recently, and that neither the legislature nor the judges, until within a few years, thought much of it;* but it is a very convenient doctrine; it is now well understood, and I think it solves the difficulty with which this case was surrounded. The doctrine of domicile was certainly not at all regarded in the case of *The Attorney-General* v. *Cockerell* (1814), nor in that of *The Attorney-General* v. *Beatson* (1815). If it had been the

> criterion at that time there would have been no difficulty at all in determining this question; but now, my lords, when we do understand this doctrine better than it was understood formerly, I think that it gives a clue which will help us to a right solution of this question.
>
> It is impossible that the words of the statute can be received without any limitation; foreigners must be excluded. Then the question is, What limitation is to be put upon them? And, I think, the just limitation is the property of persons who die domiciled in Great Britain. On such property alone, I think, can it be supposed that the legislature intended to impose this tax.

The statutory ground for the decision is thus given by the Lord Chancellor, page 20:

> In the very first section of the statute the operation of it is limited to Great Britain. It does not extend to Ireland. It does not extend to the colonies. And therefore, notwithstanding the general terms contained in the schedule, those terms must be read in connection with the first section of the act, and it is clear, therefore, that they must receive that limited construction and interpretation which is alone consistent with the first section of the act.

The language referred to by the Lord Chancellor is evidently the following (see act 36, Geo. III, chap. 52, as amended by act 55, Geo. III, chap. 184, July 11, 1815):

> And be it further enacted, That there shall be raifed, levied and paid unto and for the Ufe of

> His Majefty, his Heirs and Succeffors, *in and throughout the Whole of Great Britain*, for and in refpect of the feveral inftruments, Matters and Things, mentioned and defcribed in the Schedule hereunto annexed * * *

The operation of the English legacy tax was limited to Great Britain, and the question for the court to determine was whether the domicile of the decedent or the location of the legacy controlled. By holding that the domicile of the decedent was controlling, the English court brought within the operation of the English law the personal property of all those who were domiciled in Great Britain, wholly irrespective of the location of the property. How such a construction benefited the revenues of England is well described by Judge Pearson, in his opinion in *Alvany* v. *Powell* (2 Jones, Eq., 51, p. 54):

> But in all cases the question is treated as one affecting the public revenue. It is a probable supposition that in England, for every dollar having its situs there but owned by one domiciled abroad, there are one hundred dollars having its situs abroad but owned by one having his domicile there; so, on the score of revenue alone, the consideration for adopting the principle of the *domicile*, rather than that of the *situs* of the property, was one hundred to one.

III.

THE AMERICAN CASES.

In my brief and opening argument I referred to the many decisions of this court holding that the maxim

"*mobilia personam sequuntur*" was never of universal application, and has been obliged to yield to the exigencies of modern life, so as to permit the actual situs of the property to control in matters of taxation when justice so requires. But I have been challenged, both in the oral argument and in the reply brief, to refer to *any cases holding* that the maxim does not apply in the construction of a legacy act where the language is not explicit and admits of construction. In other words, the contention is that wherever the courts have been free to apply the maxim, they have done so in construing legacy tax laws so as to exempt the personal property of nonresident decedents from legacy taxes. I shall now refer the court to some of the cases in which the courts of this country have explicitly refused to adopt and apply this maxim, although the language of the acts permitted it.

NORTH CAROLINA.

The North Carolina collateral inheritance act provided that:

> A tax of 1 per cent shall be levied and collected upon the value of all personal property or goods bequeathed to strangers or collateral kindred, or which shall be distributed to or among the next of kin, of any intestate when such next of kin are collateral relations of such intestate.

The construction of this language came before the supreme court of North Carolina in the case of *Alvan* v. *Powell* (2 Jones Eq., 51). It is to be observed that the language admits of construction. It is as doubtful

as the language of the English act. It is susceptible of being construed so as to apply either to all personal property situated within North Carolina or to all personal property belonging to decedents domiciled in North Carolina. The case of *Thompson* v. *Advocate-General* was relied on in support of the latter construction. But the court, after criticising, declined to follow this case, and held that the situs of the property and not the domicile of the decedent should control. The opinion by Judge Pearson contains a lucid analysis of the opinions in the English case. The broad consideration favoring the view taken by the court is thus stated (p. 52):

> If the property of one of our citizens, which is situate here, and passes to strangers or his collateral kindred, is subject to a tax because of the protection it receives under our laws, why should not the property of one who has his domicil abroad but whose property is situate here, is protected here, and is administered here, and passes by force of our laws, be subjected to a like tax?

Respecting the claim that personal property descends by the law of the domicile and therefore the transmission of the personal estate of one domiciled abroad ought not to be taxed, Judge Pearson says (p. 58):

> Our courts from comity adopt and act upon the laws of the country of the domicile, *as our law in reference to the particular case*, so as to hold those entitled who would be entitled according to the law of the country of the domicile; but all this is very far from reaching the

proposition that the property is not administered under *the authority of our courts* and by our law. * * *

The idea that our courts administer the laws of another country is a novel one; but the principle that, in particular cases, our court will adopt and act upon, *as our law*, the laws of another country is a familiar one, and is well settled according to the comity of nations in reference to the disposition of the property of deceased persons who have a foreign domicile, upon the ground that if one makes a will which he believes to be valid, because executed according to the laws of his country, it would be hard to disappoint his intentions by refusing to recognize it as valid in the country where his property may happen to be at the time of his death. Or if one dies intestate, under the belief that his property will belong to certain of his kindred, because such is the law of his country, it would be hard to disappoint his expectations by enforcing the general law of the country where the property happens to be, instead of adopting for his special case the law of his country. When the English courts adopted the law merchant, it could not be said they administered the law of the Romans. When we adopted the law of England *we made it our law*; so, when we adopt the law of a foreign country, for special reasons applying to a particular case, *it is our law*.

When a country adopts a foreign law and applies it to persons and property within its own dominion, it does not subject persons and property under its control

to a foreign jurisdiction. It simply enacts by designation, incorporating into the body of its own law the foreign law which it sees fit to adopt. This practice is not unknown to Congress. In legislating for the Territories Congress has seen fit to adopt the law of a particular State and apply it within the Territory, thus enacting by designation or reference. This was done when Congress applied the laws of Oregon to Alaska (23 Stat., 25) and certain statutes of Nebraska to Oklahoma (26 Stat., 87); but the State law thus adopted *became the Federal law*, otherwise it could have had no force within territory subject to the exclusive jurisdiction of Congress.

The opinion in this case is worth reading. It touches upon nearly every point discussed in the case before the court. It is noticeable that the court took the view that the personal property of a nonresident decedent passes in North Carolina *by virtue of the laws of North Carolina, and therefore, in a case of intestacy, by the intestate laws of North Carolina* The court utterly rejects the view that the law of any foreign country can have any force or effect in North Carolina. North Carolina may, out of comity, adopt the law of another country and make that law its own law, but it then becomes its law and not the law of any other country. Obviously, under this construction, the Federal legacy tax would apply to the personal estates of nonresident decedents in North Carolina, for such estates would either pass by will or by the intestate laws of North Carolina. *But if applicable there, ought not the court to adopt a construction*

making the law applicable everywhere? Does not the uniformity enjoined by the Constitution require that the same legacy tax be imposed and collected in every State under the same circumstances?

MARYLAND.

The Maryland collateral inheritance law (Maryland Code, 1888, vol. 2, p. 1242) subjects to the tax—

> All estates, real, personal, and mixed, money, public and private securities for money of every kind, passing from any person who may die seized and possessed thereof, *being in this State*, or any part of such estate or estates, etc., transferred by deed, etc., to take effect after the death of the grantor, etc.

In the case of *State* v. *Dalrymple*, 70 Md., 295 (1889), the question came before the supreme court of Maryland whether the phrase "being in this State" referred to the estate or to the decedent. The words are equivocal. They may be construed either way. If the court cared to follow the maxim "*mobilia, etc.*," the opportunity was open. It was free to adopt the law of the domicil or the law of the situs in construing the act. The court commented, in its opinion, on the English cases, but it declined to follow them, holding that the situs of the property and not the domicil of the decedent must control. Judge McSherry says (p. 301):

> The tax, we have said, is one on the *transmission* of the property "being in the State," and no reason has been assigned or can be suggested why the broad language of the statute and the evident design of the legislature should

be so narrowed and restricted as to exempt from this tax the property of a nonresident actually here, notwithstanding that same property may, for other purposes, be treated as constructively elsewhere. If we adopt the view insisted on by the appellees *it would result in a discrimination in favor of a nonresident and against our own citizens*, a discrimination, too, which the legislature certainly never intended to make, and for which no warrant whatever can be found in the plain letter of the statute.

PENNSYLVANIA.

The collateral inheritance act of 1887 (Laws of 1887, p. 79) subjects to the tax—

> All estates, real, personal, and mixed, of every kind whatsoever, situated within this State, whether the person or persons dying seized thereof be domiciled within or out of this State, and all such estates, situated in another State, Territory, or country, when the person or persons dying seized thereof shall have their domicil within this commonwealth, *passing from any person who may die seized or possessed of such estates, either by will or under the intestate laws of this State*, etc.

It is to be observed that the language "passing from any person who may die seized or possessed of such estates, *either by will or under the intestate laws of this State*," applies to the estates in Pennsylvania of nonresident decedents, as well as to the estates of resident decedents. Both are treated by the act as passing "either by will or under the intestate laws of this State."

In *Small's Estate*, 151 Pa. St., 1 (1892), it was held that the interest of a nonresident decedent in a partnership carried on in Pennsylvania was liable to the tax. Judge Sterrett says, respecting the maxim "*mobilia personam sequuntur*" (p. 14):

> The partnership property was largely made up of lands, merchandise, flour, grain, and other personal property which had a visible and tangible existence and an actual situs in this State. As was said by Comstock, C. J., in *Hoyt* v. *Comrs.* (23 N. Y., 224, 228), "the fiction or maxim, *mobilia personam sequuntur*, is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice requires. *In other circumstances, the truth and not the fiction affords, as it plainly ought to afford, the rule of action.* * * * *I can think of no more just and appropriate exercise of the sovereignty of a State or nation over property situated within it and protected by its laws than to compel it to contribute toward the maintenance of government and law.*" "A nation within whose territory any personal property is actually situated, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there." (Story's Confl. of Laws, 550.)

NEW YORK.

I have already in my brief (p. 15) quoted at length from the decision of the highest court of New York in the *Matter of the Estate of Romaine* (127 N. Y., 80), in

which it is said there can be no more just and appropriate exercise of the sovereignty of a State or nation over property situated within it and protected by its laws than to compel it to contribute toward the maintenance of government and law. "Accordingly," it is said, "there seems to be no place for the fiction of which we are speaking (*mobilia personam sequuntur*) in a well-adjusted system of taxation."

In the *Matter of Whiting*, 150 N. Y., 27 (1896), wherein it was held that the bonds of foreign as well as domestic corporations, and certificates of stock of domestic corporations owned by a nonresident decedent, but deposited by him in a safe-deposit vault in New York, were subject to taxation under the transfer-tax act, Judge Vann says, respecting the maxim (p. 30):

> The legislature intended, as I think, to repeal the maxim "*mobilia personam sequuntur*," so far as it was an obstacle and to leave it untouched so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of this State.

In other words, the policy of New York has been to refuse to permit the maxim "*mobilia*," etc., to be used for the purpose of exempting personal property situated in the State from legacy taxes, and to employ it only for the purpose of bringing personal property located outside the State within the jurisdiction of its legacy tax laws.

The extent to which New York has carried its policy of bringing every possible subject within the operation

of its inheritance-tax laws appears in the following cases:

In the *Matter of Bronson*, 150 N. Y., 1 (1896), while it was held that the bonds of a New York corporation held by a nonresident decedent at his domicil were not subject to the New York transfer tax, they held that certificates of stock in a New York corporation so held were. This was on the ground that while bondholders are creditors, the owners of stock are shareholders, whose property, in contemplation of law, is located where the corporation exists.

In the *Matter of Houdayer* (150 N. Y., 37) it was held that the individual deposits of a nonresident decedent, made by him with a trust company in New York, are subject to taxation under the transfer tax act. Said the court (p. 40):

> The depositary was a resident corporation, and the receiving and retaining of the money were corporate acts in this State. Its repayment would be a corporate act in this State. Every right springing from the deposit was created by the laws of this State. Every act out of which those rights arose was done in this State. In order to enforce those rights, it was necessary for him to come into this State. Conceding that the deposit was a debt, conceding that it was intangible, still it was property in this State for all practical purposes, and in every reasonable sense within the meaning of the transfer tax act.

In the *Matter of Fitch*, 160 N. Y., 87 (1899), the levying of a transfer tax on shares of stock in a New

York corporation (348 shares of Consolidated Gas) was sustained, although these shares, with the consent of the corporation, had been transferred to the legatees by the Connecticut executor, no administration having been taken out in New York.

IOWA.

While the New York policy has been to use the maxim *mobilia*, etc., only for the purpose of extending the operation of its inheritance-tax laws to personal property located outside of New York, Iowa has, it seems to me, repudiated the maxim altogether The collateral inheritance tax of that State is applied to—

> *All property within the jurisdiction of this State*, and any interest therein, whether belonging to the inhabitants of this State or not. (Code of 1897, section 1467.)

And in *Weaver's Estate* v. *State* (81 N. W. Rep., 603) the supreme court of Iowa held that a herd of cattle upon a farm in Missouri, belonging to a resident of Iowa, who died in Iowa, was not subject to the tax imposed, because the act only applied to property "within the jurisdiction of the State," and this property was without the jurisdiction of Iowa and within the jurisdiction of Missouri. Here the situs of the property, and not the domicil of the decedent, was held controlling.

IV.

I have referred to some, but by no means all, the cases repudiating the doctrine of "*mobilia personam sequuntur*" when applied to matters of taxation. I pass

now to a consideration of the question whether the personal property of a nonresident decedent, dying without a will, may properly be said to pass "by the intestate laws of the State" wherein it is situated. I discussed this question upon principle in my brief and on the oral argument. It is my purpose now to refer to the inheritance tax laws and decisions of certain States, for the purpose of showing that such personal property is regarded as passing by the intestate laws of the State wherein it is situated for the purpose of levying legacy taxes.

It is true that, owing to the decision in the *Matter of Enston* (118 N. Y., 174) the collateral inheritance tax law of New York was so amended in 1887, and afterwards construed in the *Matter of Romaine* (127 N. Y., 80), as to offer a basis for the argument made by the other side, that in New York the property of a nonresident decedent is not regarded as passing either by will or by the intestate laws of the State, but is taxed only because it is transferred within the State. The wording of the transfer tax law may be used to support this argument. Of course it has never been necessary in New York to consider carefully and determine definitely whether the personal property of a nonresident decedent does pass by the intestate laws of the State, for the reason that there is an explicit provision that if such property is within the State it shall be subject to the tax.

At the same time, to warrant the New York tax, there must be a transfer within New York for the privilege of which the tax is the price paid, and I am at a

loss to understand how there can be a taxable transfer within New York, unless such transfer takes place by virtue of the laws of New York.

If time permitted, I should like to comment on the New York cases, beginning with *Parsons* v. *Lyman* (20 N. Y., 112), and the New York legislation, on the subject of the descent and distribution of the personal estates of nonresident decedents. The cases and the statutes certainly do not support the claim of the other side that right along the maxim "mobilia," etc., has been followed and the law of the domicil of the decedent at the time of his death been recognized and enforced.

In other words, New York has not acted upon the theory that the personal property of the alien decedent situated within New York is to be treated for all legal purposes as located at the domicil of the decedent at the time of his death. It is true that in *Parsons* v. *Lyman* (20 N. Y., 112) and in *Moultrie* v. *Hunt* (23 N. Y., 395), the law of the domicil of the testator at the time of his death was recognized as the proper rule of decision. But that was only a case of lawmaking through comity. The foreign rule adopted became the law of New York. But the rule recognized in *Moultrie* v. *Hunt* has been changed by legislation; that rule was that the law of the decedent's domicil at the time of his death determined the validity of his will, and in 1876 the legislature changed the law, by making the domicil of the testator at the time of the making of his will the test (act of April 11, 1876).

In 1880 the act of 1876 was incorporated into the Civil Code, constituting sections 2611, 2612, and 2613. Thus the law remained until 1893, when the substance of these three sections were incorporated in section 2611 of the Code of Civil Procedure. As the New York law now stands the personal property of a nonresident is not supposed to be located at the place of his domicil at death, nor is the validity of his will determined exclusively by the law of such country. The nonresident may now execute a will according to the laws of New York, or in certain cases according to the law of the State or country where the will may be executed. Further provisions upon the subject of wills are contained in section 2694. I merely refer to the statutes. The court may examine them if it sees fit. As the court will perceive before I get through, I plant my case on broader grounds than a mere State rule or enactment. I plant it on grounds applicable, it seems to me, throughout the entire country.

Several States have adopted the phraseology of the New York collateral inheritance tax law, as amended in 1887: California, in its collateral inheritance tax law of March 23, 1893, as amended by the act of March 9, 1897 (Statutes of 1897, p. 77), held to be constitutional in the case of *In re Wilmerding* (117 Cal., 281), and Montana, in its tax law of March 4, 1897 (Laws of 1897, p. 83), held to be constitutional in *Gelsthorpe* v. *Furnell* (20 Mont., 299). The Michigan act, passed in 1899 (Public Acts 1899, p. 285), was evidently based on the transfer tax law of New York and adopts its phraseology.

ILLINOIS.

The Illinois act, passed June 5, 1895 (Hurd's Statutes, 1899, p. 1460), the constitutionality of which was sustained in *Kochensperger* v. *Drake* (167 Ill., 122), and in *Magoon* v. *Illinois Trust and Savings Bank* (170 U. S., 283), follows the phraseology of the New York collateral inheritance law of 1887 in subjecting to the tax—

> All property, real, personal, and mixed, which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, or, if decedent was not a resident of this State at the time of his death, which property or any part thereof shall be within this State, etc.:

Singularly enough, in the case of *Billings* v. *The People* (189 Ill., 472, 1901) the opportunity presented itself for a construction of the phrase "the intestate laws of this State." It seems that the widow of a resident testator renounced the provision made for her in the will and took her share under the statutes of the State relating to dower. She then contended that the share she thus received did not pass to her "by the intestate laws of the State." The court held it did, saying (bottom p. 477):

> There are no laws of this State which are specifically designated as "intestate laws," and we are called upon to determine what laws or system of laws were referred to under that appellation by the act in question. The same

> term is employed in similar statutes in other States, *and we have no doubt the laws referred to are those laws of the State which govern the devolution of estates of persons dying intestate and include all applicable rules of the common law in force in this State.* The statutes from which we have above quoted are intestate laws and they govern, regulate, and control the interest which the widow, Augusta S. Billings, took in her husband's property at his death. As a general rule the property of persons dying passes in two ways—that is, by will or by descent in the modes provided by law; and when it does not pass *by will it generally passes by law; that is, by the law governing the disposition of property of persons dying intestate.*

This is precisely our understanding of the meaning of the phrase as used in the Federal law. Congress understood that all property which has not been disposed of by gift to take effect after death, passes either by will or by descent in the modes provided by law. When it does not pass by will it passes by law, and the law by which it passes is the intestate law of the State.

MASSACHUSETTS.

The Massachusetts collateral inheritance law passed in 1891 (Statutes of 1891, chap. 425) subjects to the tax—

> All property within the jurisdiction of the Commonwealth and any interest therein, whether belonging to inhabitants of the Commonwealth or not, and whether tangible or intangible,

which shall pass by will or by the intestate laws of the Commonwealth regulating intestate successions, etc.

It is to be observed that while this law subjects all property within the jurisdiction of the Commonwealth to the tax, it only subjects all property within the jurisdiction of the Commonwealth "which shall pass by will or by the intestate laws of the Commonwealth regulating intestate succession." The question whether the personal property of a nonresident decedent who died without a will passed "by the intestate laws of the Commonwealth regulating intestate succession" came before the supreme court of Massachusetts in *Callahan* v. *Woodbridge* (171 Mass., 595). Judge Knowlton, delivering the opinion, said (p. 597):

> The legal right of the legislature to make such a provision in regard to the property of a nonresident owner rests upon the fact that the property is within the State and subject to its jurisdiction. This power is as large in reference to the property of a nonresident decedent as in reference to that of the inhabitants of the Commonwealth. It covers the property within the jurisdiction. The ground for its exercise is that the property has the protection of our laws, and that our laws are invoked for the administration of it when a change of ownership is to be effected.
>
> In the statute before us the succession to property of nonresidents is expressly taxed as any property belonging to inhabitants of the Commonwealth. The language "which shall

> pass by will or by the laws of the Commonwealth regulating intestate succession," taken in connection with the clauses immediately preceding it, applies to foreign wills, and *to property that passes under the statute of this Commonwealth which regulates the succession to the property of a nonresident owner after his death, and declares that it shall be "disposed of according to the laws of the State or country of which he was an inhabitant.*"

Suppose a case like the Hunnewell case would now arise in Massachusetts. Suppose a person domiciled in France should die intestate, leaving personal property in Massachusetts, and both the State and the Federal tax should be resisted on the ground, in the first instance, that the property did not pass "by the intestate laws of the Commonwealth regulating intestate succession," and in the second instance, on the ground that it did not pass "by the intestate laws of any State." Assuredly the supreme court of Massachusetts, following the case of *Callahan* v. *Woodbridge*, would hold that the property did pass "by the intestate laws of the Commonwealth regulating intestate succession." After such a holding, would this court be free to say that the property did not pass by the intestate laws of any State?

Respecting the contention of the other side, that it is not necessary to appeal to the courts of a State in order to transmit the personal property of a nonresident decedent, but that this may be done by a transfer outside of the court, let me refer to the case of *Greves*

v. *Shaw* (173 Mass., 205), in which it was held that the fact that shares of stock in Massachusetts banking and other corporations owned by a nonresident decedent had been transferred by his foreign executor without taking out ancillary administration in Massachusetts did not avail to avoid the Massachusetts inheritance tax. Judge Knowlton said (p. 210):

> Since the enactment of the statute of 1891, chapter 425, persons claiming a succession to property in this Commonwealth under nonresident owners must hold their right subject to the prior right of the Commonwealth to have the property administered here, in order that taxes may be paid upon the succession. The fact that the petitioner was able to obtain a transfer of a large part of the stock before the will was proved in this Commonwealth does not affect his duty under the statute to pay the tax.

MAINE.

The Maine law, passed in 1893 (chapter 146), as amended in 1895 (chapters 96 and 124), follows the phraseology of the Massachusetts law in subjecting to the collateral inheritance tax:

> All property within the jurisdiction of this State, and any interest therein, whether belonging to inhabitants of this State or not, and whether tangible or intangible, *which shall pass by will or by the intestate laws of the State*, etc.

The constitutionality of this law was sustained in an elaborate opinion in *State* v. *Hamlin*, 86 Maine, 495 (1895).

OHIO.

Both the Ohio laws, that passed in 1893 (Laws of 1893, p. 14), which imposes a collateral inheritance tax, and that passed in 1894 (Laws of 1894, p. 166), which imposes a direct inheritance tax, use the exact language of the Maine law, and subject to the tax:

> All property within the jurisdiction of this State, and any interest therein, whether belonging to inhabitants of this State or not, and whether tangible or intangible, *which shall pass by will or by the intestate laws of this State*, etc.

CONNECTICUT.

Precisely similar is the collateral inheritance tax of Connecticut (Laws of 1889, p. 106) which applies to—

> All property within the jurisdiction of this State, and any interest therein, whether belonging to inhabitants of this State or not, and whether tangible or intangible, *which shall pass by will or by the intestate laws of this State*, etc.

As in the case of Massachusetts, so in the case of Maine, Ohio, and Connecticut, it is to be observed that the language used by the lawmakers in levying the inheritance tax assumes and recognizes that personal property within the jurisdiction of the State, although belonging to a person not an inhabitant of the State, passes, in case of death, if not by deed to take effect after death, then either "by will or by the intestate laws of the State." *In each of these States there is the conclusive recognition by legislative enactment of a fact which would subject the estate of a nonresident decedent to the Federal legacy tax.*

TENNESSEE.

The act of April 10, 1893 (Acts of 1893, p. 347), follows the phraseology of the Pennsylvania act in providing for the levying of a collateral inheritance tax on—

> All estates, real, personal, and mixed, of every kind whatsoever, situated within this State, whether the persons dying seized thereof be domiciled within or without this State, *passing* from any person who may die seized or possessed of such estates, *either by will or under the intestate laws of this State*, etc.

The constitutionality of this act was sustained in *State* v. *Alston* (94 Tenn., 674). Obviously the legislature of Tennessee took the view that every estate, of whatever nature, situate within that State, if not disposed of by gift to take effect after death, passed "either by will or under the intestate laws of that State." Clearly, then, the personal estate of a nonresident decedent could not escape the Federal tax in Tennessee on the ground urged in this case.

V.

It is urged that the Federal legacy tax does not apply to the estates of nonresident decedents, because there is no method provided for ascertaining the tax. All these objections to the sufficiency of the machinery of the Federal law may be urged with equal force against the application of the State legacy tax to such estates. Nevertheless, the inheritance tax laws of New York, collateral and direct, which have exemptions

and are graded according to kinship and are computed on the "clear market value" of the property transmitted, have been and are daily applied to every variety of personal estate belonging to nonresident decedents. There is no more difficulty in ascertaining and computing the Federal tax than there is in ascertaining and computing the New York tax. The methods followed in one can be used for the other. The easy manner in which speculative difficulties may be surmounted in the administration of such a law is shown in the *Matter of James*, 144 N. Y., 6 (1894). In that case the authority of an executor in charge of an estate consisting partly of personalty located in England, and partly of personalty located in New York, to pay certain legacies to collaterals out of the English estate and pass the New York estate on to direct heirs, so as to escape the collateral inheritance tax, was sustained. The court pointed out (p. 11) that the fact of such appropriation would, of course, appear upon the account of the executor. If the executor determined to pay the legacies from the English estate, the American estate would be freed from the burden of the special tax. It would be an easy matter for the person in charge of the property within the United States to submit a statement showing that he had or was going to dispose of the property in such a way as to exempt it from the payment of the Federal tax. There was no difficulty in either of the cases at bar in presenting to the proper authorities the real facts affecting the disposition of the American estates of the nonresident decedents.

VI.

If time permitted, I should take pleasure in personally examining the laws of all the States regulating the descent and distribution of the personal estates of nonresident decedents. It is not possible for me to do this. As illustrating the fact that there is a diversity of State laws upon this subject, I print as an appendix extracts from the brief of Mr. George H. Pettit, United States attorney, filed in the circuit court of appeals in the Ruckgaber case. The lesson to be drawn from the variety of provisions is that to make the Federal legacy tax uniform and equal, this court must reject the fiction of the domicile and follow the fact of the situs. In no other way can the law be fairly enforced or the intention of Congress carried into effect. Suppose the court adopts the maxim "*mobilia*," etc., as the rule in interpreting and applying the Federal act. For the purpose of this rule each State is foreign to every other State. If, then, a citizen of Iowa dies in that State leaving personal property in Missouri, which is not within the custody of the Iowa executor or administrator, the Federal officers may be met with this situation when they attempt to collect the tax. The Iowa executor may decline to pay the tax because the Missouri property is not in his custody nor within the jurisdiction of Iowa, the law only applying to personal property which he has in charge. If the Federal officers attempt to collect the tax in Missouri, they may be met with the maxim "*mobilia*," etc., and the assertion that the personal property in Missouri is not

subject to the tax because it follows the domicile of its owner and is deemed to be situated in Iowa. The way out of this difficulty is to tax the transmission of the property where the property actually is when transferred. This the Federal act evidently contemplates, for it makes the person in charge of the personal property liable for the tax and provides that the tax shall be a lien upon the property. The law does not look to the legatee or impose any liability upon him because of the receipt of the property.

In *United States* v. *Allen* (9 Ben., 154; 24 Fed. Cases, 770) it was held that the Federal legacy tax of 1864 imposed a tax *in personam* only on the executor and not on the legatee; that the remedy was either against the executor by a proceeding *in personam* or against the property by a proceeding *in rem*. In this case there was an attempt to sue the legatee personally, which failed. Judge Blatchford, after referring to the provisions of the law, said:

> The executor is made subject to the tax, not the legatee. The executor is to pay the tax, not the legatee. The executor is to make the statement, not the legatee. The executor is to receive the receipt from the collector, not the legatee. If the executor neglects to pay the tax, or to deliver the statement, or violates the requirements of the statute, it is not provided that a suit shall lie against the legatee, in personam, to recover the tax, but that there shall be proceedings to enforce and realize the lien on the property or personal estate of the deceased. Those

proceedings are to be in the nature of proceedings in rem, to subject the property of the deceased in the hands of any person who may have the custody or possession of it, to sale, to pay the tax.

Thus it appears that the essential thing is the presence of the property within the jurisdiction of the United States. The remedy is against the property or the person in custody of it, not against the legatee.

VII.

The Federal tax rests not upon the power to regulate the descent but upon the fact of the transmission of personal property. The fact that the States have the power to regulate the descent and distribution of the personal property of nonresident decedents within their jurisdiction should lead this court, in construing the law before it, *to presume conclusively that the States have done this in every case;* in other words, to presume conclusively that in every case personal property within a State, which has not been disposed of by gift to take effect after death, in passing from the dead to the living, does so either by will or by the intestate laws of the State. If this is not conclusively presumed, then it remains with the State, which has full power to regulate, to say whether such property shall or shall not pass by will or by the intestate laws of the State; that is, by enactment or decision to determine whether the Federal legacy tax shall or shall not be collected on such property within its limits.

Every State has complete dominion over personal

property situated within it, and may regulate its descent or distribution, regardless of where its owner was domiciled when he died. It may enact a body of laws regulating in detail the descent in case of the intestacy of a nonresident, or it may by a general law adopt the laws of the country of the domicile of the intestate for the purpose of determining how his personal property shall pass. Will this court say that if a State does the first thing the transmission of the nonresident's property shall be taxed under the Federal law, and if it does the second thing that it shall not be taxed? Will the court permit a fiction to abrogate the uniformity enjoined by the Constitution? The situation here is not akin to that in England when the maxim "*mobilia*," etc., was adopted and applied. Parliament had full power both to regulate and to tax. Congress has no right to regulate; it has only the power to tax. The power to regulate rests with the State. Congress in legislating for the Union assumes this fact. It acts upon the supposition that each State has regulated the descent of personal property within its borders; that the State law controls and not the law of any foreign country. Congress recognizes that all property within the States is subject to the State law and must be passed from the dead to the living by virtue of the State law, that is, either by will or by the law of the State which operates when there is no will. The latter is the intestate law of the State, and it applies as well to nonresidents as to residents. Congress never intended that the States, by any legerdemain,

by any use of fiction instead of fact, should be left free to limit or restrain the Federal Government in the imposition and collection of this duty. Congress did not intend to leave a State free to collect the tax itself because there was a transfer under its laws, within the scope of its jurisdiction, and yet, either by enactment or decision, deprive the Federal Government of the benefit of taxing the same transfer.

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 17, 1901.

APPENDIX.

SECTIONS 29, 30, AND 31 OF THE ACT OF JUNE 13, 1898 (30 STAT., 464), AS AMENDED MARCH 2, 1901 (31 STAT., 948).

[The amendments are indicated by brackets. The italics indicate provisions to which the attention of the court is directed.]

SEC. 29. That *any person or persons having in charge* or trust, as administrators, executors, or trustees, *any legacies or distributive shares* arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, *passing*, after the passage of this act, from any person possessed of such property, *either by will or by the intestate laws of any State or Territory*, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, *shall be, and hereby are, made subject to a duty or tax, to be paid to the United States*, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: Provided, That all legacies or property *passing by will, or by the laws of any State or Territory*, to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set

forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

SEC. 30 (as amended). That the tax or duty aforesaid [shall be due and payable in one year after the death of the testator and] *shall be a lien and charge upon the property* of every person who may die as aforesaid, for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; [and every executor, administrator, or trustee having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof, in writing, to the collector or deputy collector of the district where the deceased grantor or bargainer last resided within thirty days after he shall have taken charge of such trust,] and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident [*or in which the property was located in case of nonresidents,*] the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of

the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain *the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest*, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property,

or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, *or where no administration upon such property or personal estate, shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same to be sold upon the judgment or decree of such court*, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, *to be paid under its direction to such person or persons as shall establish title to the same.* The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from

the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge, or custody any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of five hundred dollars: *Provided*, That in all legal controversies where such deed or title shall be the subject of judicial investigation the recital in said deed shall be prima facie evidence of its truth and that the requirements of the law had been complied with by the officers of the Government: [*And, provided further*, That in case of willful neglect, refusal, or false statement by such executor, administrator, or trustee, as aforesaid, he shall be liable to a penalty of not exceeding one thousand dollars, to be recovered with costs of suit. Any tax paid under the provisions of sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged.]

SEC. 31. *That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act.*

THE DIVERSITY OF STATE LAWS.

[From Mr. Pettit's brief below.]

MAINE.

The laws of Maine provide that—

> When administration is taken in this State on the estate of any person, who, at the time of his death, was not an inhabitant thereof, his estate found here, after payment of his debts, shall be disposed of according to his last will, duly executed *according to the laws of this State*, if he left any; but if not his real estate shall descend according to the laws of this State; and his personal estate shall be distributed according to the laws of the State or country of which he was an inhabitant; and the judge of probate, as he thinks best, may distribute the residue of said personal estate as aforesaid, or transmit it to the foreign executor or administrator, if any, to be distributed according to the law of the place where the deceased had his domicile. (Revised Statutes, chap. 65, sec. 36.)

The State of Maine thus makes a difference between testacy and intestacy that does not support the theory of the Hunnewell case. If the deceased leaves a will it must be according to the law of the State, when his property would certainly pass by the law of that State, and the executor be liable for the tax if the other conditions prevailed, while if the decedent died intestate the law of the domicile would apply, and, if the executor's contention in this case is correct, he would not be liable for the tax.

MISSISSIPPI.

In Mississippi all personal property follows one rule, and it *appears that the law of the domicile is not recognized.* The laws of that State provide:

> SEC. 1542. All personal property situated in this State shall descend and be distributed according to the laws of this State, regulating the descent and distribution of such property, regardless of all marital rights which may have accrued in other States, and notwithstanding the domicile of the deceased may have been in another State, and whether the heirs or persons entitled to distribution be in this State or not; and the widow of such deceased person shall take her share in the personal estate according to the laws of this State. (Annotated Code of Mississippi.)

WASHINGTON.

In the State of Washington there appears to be no distinction drawn between the estates of resident and nonresident intestates in its Statutes of Distribution. Ballinger's Codes and Statutes, vol. 2, sec. 6121, provides that—

> All provisions of law relating to the carrying into effect of domestic wills after probate shall, so far as applicable, apply to foreign wills admitted to probate in this State, as contemplated in the preceding section.

The preceding section provides that foreign wills, executed with certain formalities, be admitted to probate in this State.

WYOMING.

The laws of the State of Wyoming provide that—

> When administration shall be taken in this Territory on the estate of any person who at

> the time of his decease was an inhabitant of any other State or country, his real estate found here, after the payment of his debts, shall be disposed of according to his last will according to the laws of this Territory, and his personal estate according to his last will according to the laws of his domicile; and if there should be no such will his real estate shall descend according to the laws of this Territory, and his personal estate shall be distributed and disposed of according to the laws of the State or country of which he was an inhabitant. (Revised Statutes, sec. 2195.)

This State's law thus provides that the nonresident's will shall be good if executed according to the place of his "domicile," but if he dies intestate then his property passes according to the law of the State or country of which he was an "inhabitant." The words are held in some States to have different meanings. A man may have his domicile in one State, but reside in and be an inhabitant of another State. And the conditions of testacy and intestacy might lead to very different results and situations in Wyoming under the legacy tax law, but in any event the succession must be as directed by the Wyoming law, for this very section is the only authority of the successor to take at all under any rule.

KANSAS

In the State of Kansas, in case of intestacy, personal property is distributed in the same manner as real estate; and there appears to be no expressed distinction between resident and nonresident intestates, and the provision of law appears to be as follows, in regard to wills:

> If on hearing it shall appear to the court that the instrument (i. e., a foreign will executed,

proved, and allowed abroad) ought to be allowed in this State, the court shall order the copy to be filed and recorded, and the will and the probate and record thereof shall then have the same force and effect as if the will had been originally proved and allowed in the same court in the usual manner: but nothing herein contained shall be construed to give any operation or effect to the will of an alien different from what it would have had if originally proved and allowed in this State. (General Statutes, vol. 2, p. 566, sec. 57.)

COLORADO.

In the State of Colorado there appears to be no distinction drawn in the Statute of Distributions between resident and nonresident intestates. Statutes, vol. 1, page 421, sec. 99, is as follows:

> The personal estate of an alien, dying intestate, who, at the time of his death, shall reside in this State, shall be distributed in the same manner as the estate of natural born citizens; and all persons shall be entitled to their proper distributive shares of such estate under the laws of this State, whether they are aliens or not.

NEBRASKA.

In the State of Nebraska the law provides as follows:

> When any will shall be allowed as mentioned in the preceding section (i. e., a foreign will allowed in this State), the probate court shall grant letters testamentary or letters of administration with the will annexed, and such letters testamentary or letters of administration shall extend to all the estate of the testator in this State; and such estate, after payment of his just debts and expenses of administration, shall be disposed of according to such will, so far as such will may operate upon it, and the residue

shall be disposed of as is provided by law in cases of estates in this State belonging to persons who are inhabitants of any other Territory, State, or country. (Compiled Statutes, sec. 2661.)

And in section 2691 it further provides:

When any person shall die intestate, being an inhabitant of this State, letters of administration of his estate shall be granted by the probate court of the county of which he was an inhabitant or resident at the time of his death. If such deceased person, at the time of his death, resided in any other Territory, State, or county, leaving estate to be administered in this State, administration thereof shall be granted by the probate court of any county in which there shall be estate to be administered; and the administration first legally granted shall extend to all the estate of the deceased in this State, and shall exclude the jurisdiction of the probate court of every other county.

CALIFORNIA.

The State of California and other States and Territories have sections in their general laws or codes apparently the same, copied either literally or in substance from California; among them are Idaho, Montana, Arizona, and Oklahoma, and the provision is as follows:

Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this State, leaving a will which has been duly proved or allowed in the State of his residence, and an authenticated copy thereof has been admitted to probate in this State, and it is necessary in order that the estate, or any part thereof, may be distributed according to the will that the estate in this State should be delivered to the

> executor or administrator in the State or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate and a like delivery of the proceeds. (California Code Civil Procedure, sec. 1667.)

Is not the distribution of the decedent's estate here contemplated according to the law of California or the other State or Territory having the same rule where the property may be situated? If not, why was any law on the subject necessary?

DELAWARE.

The laws of Delaware provide as follows:

> Administration of the goods and chattels, rights and credits of an intestate shall be granted by the register of the county in which he resided at the time of his death; or, if the intestate did not reside in the State, then by the register of any county wherein he has any estate, personal or real; and the administration which shall be first lawfully granted in the last-mentioned case or in the case mentioned in the next paragraph, shall extend to all the estate within the State and shall exclude the jurisdiction of the register in any other county.
>
> If in any case it be expedient that administration be granted upon the estate of a nonresident who left a will proved in another State or country, it may be granted by the register of either county to any suitable person. (Revised Code, 1852, as amended 1893, chap. 89, sec. 8.)

There are many of the States of the Union that do not seem to take any notice of the residence or nonresidence of the decedent, but treat the estates of both alike. And in the American and English Encyclopædia of Law, 2d ed., vol. 13, page 938, it is stated that *only seventeen of the States of the Union apply the*

so-called law of the domicile in dealing with the estates of nonresident decedents. And the footnote to this work specifies the States of the Union in which this law of the domicile applies as Alabama, Arkansas, Connecticut, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, New Jersey, New York, Ohio, Pennsylvania, and Vermont.

PENNSYLVANIA.

In the State of Pennsylvania the same doctrine seems to prevail as in the State of New York, relating to the administration of the property therein of deceased nonresidents, except that the legislature of Pennsylvania deemed it necessary to pass a law authorizing aliens to make a will, evidently regarding them as not having such power without it. In Pepper and Lewis' Digest, vol. 1, page 116, they give the law of that State as follows:

> 1. Every person, being a citizen or subject of any foreign State, shall be able and capable in law of acquiring and taking, by devise or descent, lands and other real property in this Commonwealth, and of holding and disposing of the same in as full and ample a manner as the citizens of this State may or can do, and no such lands or estates so held by devise or descent shall escheat or be forfeited to the Commonwealth, for or on account of the alienage of such person claiming the same under any last will, or succeeding thereto, according to the laws of this Commonwealth.
>
> 2. All such persons shall be able and capable in law to dispose of any goods and effects to which they may be entitled within this State, either by testament, donation, or otherwise, and their representatives, in whatever place they may reside, shall receive the succession, according to the laws of this Commonwealth, either

> in person or by attorney, in the same manner as if they were citizens of this Commonwealth. (Laws of 1871.)

The State thus determines at the outset whether or not there shall be any succession at all by will. But the courts of the State will not themselves administer the estates of nonresident decedents, unless there is no one in the State who is entitled to receive the property or any portion of it; when they will direct the transmission of the property remaining after the payment of the debts to the place of residence of the deceased to be distributed to the persons there entitled to it. However, the courts regard themselves as acting under their own law, and not under the law of some other State or country. And this is one of the States where it is supposed the law of the domicile of a nonresident is applied in disposing of such estates.

In the *Matter of Deal's Appeal* (10 Harris, 22 Penn., p. 519) Chief Justice Lewis, speaking of the alleged distinction between, and the power and duties of, ancillary and ordinary executors and administrators, says:

> They are occasionally described by different terms—the administrator of the *domicile* is sometimes called the *principal*, and sometimes the primary administrator—and the administrator of the *situs* is frequently called the auxiliary, and oftener the ancillary administrator. But it does not matter what terms are used to designate the distinction in fact as to the objects of the different administrators, so that we guard ourselves against the conclusion that there is a designation in law as to the rights of the parties entitled as distributees. It was truly said by the judge who delivered the opinion of the court in *Harvey* v *Richards* (1 Mason R., 381) that, there is no magic in the words, and

> that each of the administrators may properly be considered as a principal under that reference to the limits of its exclusive authority, and each might under circumstances be justly deemed *auxiliary* administrator. Although the right of succession to personal assets of an intestate is to be regulated by the law of the country of which he was domiciled at the time of his death, it is fully settled that the *administration* of the estate must be *in the country in which possession of it is taken and held under lawful authority.*

Again, in the case of *Parker's Appeal* (61 Penn., 484), the Supreme Court, by Chief Justice Thompson, says:

> The case of *Mothland* v. *Wierman* (3 Penn.) and *Dent's Appeal* (10 Harris, 514) abundantly show that assets are not to be transmitted to the administrator or executor of the domicile when there are domestic claimants or claimants within the jurisdiction of the ancillary administration. It would be a waste of time to discuss what we see so ably discussed in the opinion of Lewis, C. J., in the last-mentioned case.

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